

From: Don Drinko  
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Gallagher Sharp Shop Talk: Workers' Compensation

**Question: When an employee fails to disclose employment during a period of temporary total disability, does this justify vacating the entire award?**

In Ohio, as in most states, the workers' compensation system relies upon claimants and physicians to be truthful about the extent of the claimant's disability. Because of this, misrepresentation about the ability to work can result in forfeiture of compensation and, in some cases, criminal charges. Recently, the Supreme Court of Ohio was asked to decide the following question: Exactly how much of a "misrepresentation" by a claimant is enough to justify vacating a compensation award?

*State ex rel. Goodwin v. Indus. Comm'n*, 124 Ohio St.3d 334, 2010-Ohio-166, concerned an employee who injured his lower back in 2001. In April, 2005, the claim was additionally allowed for "lumbar stenosis," and the employee was awarded temporary total disability compensation ("TT"), from November, 2004 through June, 2005. (This period would eventually extend through November 9, 2006.) In 2006, the BWC learned for the first time that in June, 2005, the employee worked for a week at a local YMCA, earning \$249.38. The BWC immediately moved to terminate TT and have all amounts paid since the date the employee applied for the job declared as an overpayment. A DHO for the Industrial Commission terminated TT, but declared the overpayment beginning with the date the employee started working, citing the fact that each C-84 filed thereafter contained an incorrect "last day worked." On *mandamus*, the Tenth District reversed, ordering the Commission to reinstate the entire award less the \$249.38 actually earned, noting that the employee did not actually receive any of the checks until after he had stopped working, prompting an appeal as of right.

The Supreme Court affirmed the reinstatement of the award, less the \$249.38, but rejected the lower Court's reasoning. The Court discussed the two leading cases on the issue, *State ex rel. Griffith v. Indus. Comm'n*, 109 Ohio St.3d 179, and *State ex rel. Ellis v. Indus. Comm'n* (2001), 92 Ohio St.3d 508, and found that the facts were more closely aligned with those in *Griffith* for two reasons: 1) Unlike *Ellis*, there was no "new" misrepresentation in each C-84 that the claimant was "not working," but simply a repeat of the incorrect "last day worked"; and 2) the case did not contain the "massive fraud" presented to the Court in *Ellis*. Instead, the Court found that this case was more akin to *Griffith*, which concerned a "mistake." However, the Court rejected the Tenth District's reliance on when the checks were received, noting that the "timing" of the check's arrival is irrelevant.

This is a classic case of "bad facts make bad law." The relatively small amount involved was clearly the deciding factor in this decision. Interestingly, the Court also mentions an "alleged statement" from the doctor that knowledge of this work would have changed his mind. The Court refused to consider this statement as evidence because it was not contained in the record.

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